IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6553 OF 2006

Dr. Balu Saidu Lokhande ..Petitioner
Vs.
Vithal Saidu Lokhande and anr. ..Respondents

Mr. R.G. Ketkar for petitioner.
Mr. S.S. Shah for respondent no.1.

CORAM: B.H. MARLAPALLE, J.

Date : March 29, 2007.

P.C.:

1. Heard Mr. Ketkar the learned counsel for the petitioner and Mr. Shah the learned counsel for the respondent no.1-original plaintiff.

2. This petition under Article 227 of the Constitution arises from the order dated 21/9/2006 passed by the learned Joint Civil Judge, Junior Division, Barshi thereby allowing application at Exh.25 in R.D. No. 45 of 2003. The learned Judge was pleased to issue possession warrant under Order 21 Rule 35 of C.P.C. against the defendant no.1 and defendant no.3 or anybody claiming through them. It was submitted by Mr. Ketkar that defendant no.3, the present petitioner, is one of the joint co-owners of

the suit property and he has been in possession of the said property and, therefore, the possession warrant could not have been issued against him. On the other hand, Mr. Shah, pointed out that when the proceedings in R.D. No. 45 of 2003 were pending, surreptitiously the defendant no.3, the brother of the decree holder, obtained the possession of the suit property from the judgment debtor i.e. defendant no.1 and, therefore, the learned Judge was pleased to issue the possession warrant against the defendant no.3, as well.

3. It is evident from the record that plaintiff no.1 and defendant nos.2 to 5 are the members of a joint Hindu family and RCS No.51 of 1989 was filed against the tenant, defendant no.1, for his eviction. Defendant no.3 had stepped in the witness box in support of the suit and in detail stated about the bonafide requirement of the suit premises for his medical practice. However, his hasty action for getting the decree executed without the knowledge of the plaintiff-landlord resulted in the plaintiff moving an application at Exh.25. To set the controversy at rest and with an intention not to give

any opportunity for any disputes between the brothers, more particularly when a suit for partition i.e. RCS No.380 of 2003 is already pending between the brothers, the defendant no.3 i.e. the present petitioner has filed his affidavit today and the same is taken on record and marked "X" for identification. On solemn affirmation the petitioner has stated as under:-

(a) That the suit room admeasuring 13 ft. x 8 ft. on the ground floor of C.T.S. No.3482 is a joint family property.

(b) He has taken possession of the same from defendant no.1 as a member of the joint family.

(c) His possession over the said suit property as of now will not change the nature of the property and he will not claim the same to be his self property.

(d) That the ownership and possession of the

said property shall be subject to the decree that will be passed in RCS No.380 of 2003. He has further undertaken to this court that he shall not create any third party interest in any manner whatsoever in respect of the suit property and further in the event of carrying out repairs of the said property he would not claim any equity obviously because he would be using the premises for his medical practice during the pendency of the suit for partition.

4. In view of this undertaking furnished by the petitioner, the warrant of possession issued by the learned Joint Civil Judge, Junior Division and impugned in this petition would not survive and hence the said order is hereby quashed and set aside. Consequently, the R.D. No.45 of 2003 stands settled. Of course, the issue of mesne profits would be subject to the final decree in the pending suit for partition. It is made clear that the parties and more particularly the petitioner shall be bound by the undertaking made before this court.

(B.H. Marlapalle,J.)